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No. 69.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
THEODORE DALCOUR ET AL., HEIRS OF JOHN FORBES, deceased, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR APPELLANT.

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THEODORE DALCOUR ET AL., HEIRS OF JOHN FORBES, deceased, et al. } No. 69.

Appeal from the District Court of the United States for the Southern District of Florida.

BRIEF FOR APPELLANT.

STATEMENT.

This suit was commenced by petition filed in the District Court of the United States for the Northern District of Florida, on March 3, 1875, by the heirs of John Forbes, under the provisions of the act of Congress approved June 22, 1860 (12 Stat. L., 83), "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes," extended by two subsequent statutes, to continue in force until June 10, 1875. The petitioners claimed an immense tract of land, containing 1,850,000 acres, by virtue of a grant made by

Cienfuegos, Captain-General of Cuba, dated January 10, 1818. (Tr., p. 7.)

On October 24, 1878, an amended petition was filed, by leave of the court, making the heirs of James and John Innerarity additional parties complainant, and stating that the grant relied on was made to John Forbes & Co., instead of to John Forbes, and that James and John Innerarity were partners of John Forbes; but in the order allowing these amendments was an express "saving to the United States all rights and exceptions which may arise under the statute of limitations." (Tr., p. 18.)

All the original papers in this case were lost by the fire which destroyed the United States courthouse in Jacksonville on May 19, 1891. On June 14, 1900, an application was made by petition to the District Court for the Southern District of Florida, praying for the restoration of these destroyed records and files (Tr., pp. 1–7). An answer was filed to this petition in which, among other things, it was contended against the reestablishment of the record, that the original petitioners had ceased to prosecute the matter long prior to the alleged destruction of the files and that the petitioners were guilty of gross laches by neglecting for ten years since the alleged destruction of the documents sought to be established to file their petition for restoration of the same (Tr., p. 47). An order, reciting the substance and effect of certain lost records and files, was made on May 8,

1901 (Tr., pp. 52–54). On October 18, 1901, petitioners presented their bill of revivor, to which defendants interposed a demurrer, which was overruled. The order of the court permitted the survivors of the parties to the original and amended petition to prosecute the suit for themselves and all others in interest, but, as in the order allowing the amendment making new parties, reserved the question of laches and the running of the statute of limitations. (Tr., pp. 60–62).

Afterwards a plea and motion to strike the amendment of 1878 were successively interposed by defendant upon the grounds of laches and limitation; but these were overruled. (Tr., pp. 62–67.)

Between the time of the allowance of the amended petition in 1878 and the time of the application to restore the record which had been destroyed in the fire of 1891, no steps appear to have been taken in prosecution of this suit, except an order to take testimony before a master at New Orleans on December 16, 1878.

The petition and amended petition (Tr., pp. 7–17) assert a claim of the parties named as descendants and heirs of the members of the firm of John Forbes & Co., by virtue of a grant made by the Captain General of Cuba, on the 10th day of January, 1818, to a tract of land in the country known as West Florida, comprising about 1,850,000 acres, described as follows: Commencing opposite to the mouth of the Sweetwater Creek, on the Apalachicola River, the line runs due west as far as the

river Choctawhatchee, when it follows the course of said river to its mouth in the Bay of St. Rosa, then runs eastwardly along the shores of said bay and the sea (meaning the Gulf of Mexico) to the mouth of the Apalachicola River, and up said river to the place of commencement. The consideration for the grant is stated to have been indemnity for losses in the sum of $100,000, claimed to be due from the public treasury of Spain, Florida, and Cuba.

The petition further alleges that this grant was sent to the governor of the province of West Florida, who, on the 23d day of January, 1818, put John Forbes & Co. in possession of said property.

The petition further states that this claim was presented to commissioners for examining and ascertaining claims and titles to land within the districts of East and West Florida, in pursuance of an act of Congress; and that facts in connection therewith were reported to Congress by said commissioners and printed in American State Papers, Public Lands, Volume IV, pages 94–96. The facts ascertained by this report, it is asserted, are to be received as proved.

The petition explicitly states that this grant was made before the 24th day of January, 1818; and that the possession and title of John Forbes were specially protected by the eighth article of the treaty of cession.

The petition further shows that the lands claimed have been surveyed, and by preemption grants, do-

nations, or in some other manner large quantities of them disposed of by the United States. Exhibits are attached showing the surveyed areas and disposition of the lands.

Certain allegations are made as to the authority of the Captain-General to make the grant and giving reasons for the failure to commence proceedings for possession earlier. And it is particularly alleged that at no time whatever has a report of land commissioners been made adverse to their claim now presented, nor any report suggesting fraud, favoritism, or forgery of any part of the evidence above set forth, nor has their claim at any time been presented to or examined by a court of law or equity, nor has it been acted upon by Congress at any time.

The petitioners pray for a judgment for the land described, that all the titles derived by any person, corporation, or State for portions of this land be confirmed to them, as against the plaintiffs, but that the plaintiffs have in lieu and stead thereof the same area of land scrip or warrant, to be taken in bodies of not less than 80 acres; that a patent issue to them for the land remaining unsold and their title be affirmed by the Government; and that they have judgment for the soil and waters of St. Andrews Bay.

To this petition the United States answered (Tr., pp. 67–80) that the whole matter of the suit had been already litigated between the parties and their privies and the defendant, and a judgment

rendered on the merits of the case in favor of the defendant. The defendant admitted that the claim in this proceeding had been presented to commissioners and that a report had been made thereon, but averred that under the provisions of the act of Congress of May 23, 1828, the claim was presented to and received and adjudicated by the judge of the Superior Court of the Western District of Florida; that the transcript of the grant and accompanying papers and evidence before the commissioners was presented and received in evidence; that the original grant, which was obtained from the Spanish archives at Havana, was received in evidence; that the decree was made rejecting the claim, and that no appeal was taken from this decree.

The answer denies the jurisdiction of the District Court because there is no legislation authorizing the bringing of this action, and especially denies that any authority therefor is found in the act of June 22, 1860, under which the petitioners claim to have proceeded; and says that the provision of the act of 1828, that decrees made thereunder should be final and conclusive, was not repealed by the act of 1860; that claims which have been declared to be invalid from intrinsic defects, or fraudulent, under the act of 1828, were not made valid by the act of 1860; that the claim now pending had been rejected by the tribunal and public officer acting under authority of Congress and is expressly excluded from the jurisdiction of

the District Court by the eleventh section of the act of 1860.

The answer insists that, if this proceeding could be maintained under the act of 1860, the facts found in the decree heretofore mentioned must be received in evidence equally with the facts reported by the board of commissioners recited in the petition.

The answer avers that the grant and title papers presented to the commissioners were altered and forged so as to bring them within the terms of the eighth article of the treaty of 1819 between Spain and the United States; that the grant was made without the formalities required by the Spanish laws, and without proper authority by the Captain-General; that the lands pretended to have been granted were in the possession of the Indians as their residence and common hunting grounds, and that John Forbes & Co. were never in possession of them.

To this anwer a general replication was filed. (Tr., p. 81.)

The case was referred to a master to take testimony. On March 17 the master made his report, setting out the testimony taken. (Tr., pp. 84–105 and 289–483.)

The testimony is voluminous, and was confined to the issues made by the pleadings, as hereinbefore recited.

The cause came on for hearing on May 25, 1904. During the hearing the petitioners moved the court for leave to amend by adding to the petition im-

mediately before the prayer for relief the following:

> That the grant (heretofore correctly described in this petition except as to date) to the lands described in this petition, and to which petitioners claim title and upon which they rely, was made by the Captain-General of Cuba on February 20, 1818, and has been altered so that it purports to have been made on January 10, 1818.

This amendment was allowed by leave of the court.

Afterwards, by a *nunc pro tunc* order, by leave of the court, the defendant answered to the amendment:

(*a*) That it asserts and sets up a new and different cause of action from that asserted in the original and amended petition, in that the claimants now claim under a grant to John Forbes & Co., made on the 20th day of February, 1818, whereas by the original petition they claimed under a grant made on the 10th day of January, 1818, and that their cause of action is barred by not having been brought within the limitation of the act of 1860 extended by the act of 1872.

(*b*) Defendant denied that a grant of land was made by the Captain-General of Cuba to John Forbes & Co. on February 20, 1818.

(*c*) Defendant says that if a grant was made on February 20, 1818, it was made after January 24, 1818, and was declared and agreed to be null and void by the terms of Article VIII of the treaty

between the United States and Spain of February 22, 1819. (Tr., p. 111.)

The petitioners filed a general replication to this answer. (Tr., p. 116.)

The case was taken under advisement, and on December 5, 1904, a decree was entered that the grant by Cienfuegos, the Captain-General of Cuba, to John Forbes & Co., made on the 20th day of February, A. D. 1818, which was so altered as to appear to have been made on the 10th day of January, A. D. 1818, * * * is a valid, just, and binding title against the United States. (Tr., p. 107.)

Reference to the master was again made to ascertain and report, according to the United States surveys, the lands within the boundaries of the grant yet unsold by the United States, and the area according to said surveys of the lands sold by the United States.

Upon the coming in of the master's report, and defendant's exceptions thereto, the exceptions were overruled and the report confirmed. The court then, on April 8, 1905, made and entered the final decree, by which the interlocutory decree of December 5, 1904 was affirmed and the grant therein described decreed to be a valid, just, and binding title against the United States; that lands—describing them—undisposed of under the land laws of the United States within the boundaries of the grant, containing an area of 79,681.49 acres, are the property of the legal rep-

resentatives of John Forbes, James Innerarity, and John Innerarity, and that they are entitled to recover said lands as against the United States and to receive from the United States a patent or patents for the same, and that the petitioners and their survivors and assigns are entitled to enter any of the public lands of the United States to the amount and extent of 1,190,495.45 acres, said entry to be made in conformity to the requirements of the sixth section of the act of Congress of June 22, 1860, etc. (Tr., pp. 117–132.)

The decree was filed without an opinion.

From this decree defendant prayed for and was allowed an appeal. An assignment of errors was filed with the petition for appeal, as follows (Tr., pp. 132, 133):

I. The court erred in making the decree of May 8, 1901, restoring to the files of the District Court papers claimed to be copies of the original files in this case.

II. The court erred in overruling the demurrer to the bill of revivor filed herein.

III. The court erred in granting the motion of the claimants to strike from the files the plea of the defendant to the bill of revivor.

IV. The court erred in denying defendant's motion to strike the amended petition from the files.

V. The court erred in granting the motion made by the claimants, at the hearing of the cause, to amend the petition by adding immediately before

the prayer for relief therein the words following, viz: "That the grant (hereinbefore correctly described except as to date) to the lands described in this petition, and to which petitioners claim title and upon which they rely, was made by the Captain-General of Cuba on February 20, 1818, and has been altered so that it purports to have been made on January 10, 1818."

VI. The court erred in ordering, adjudging, and decreeing that the grant by Cienfuegos, the Captain-General of Cuba, to John Forbes & Co., made on the 20th day of February, A. D. 1818, which was so altered as to appear to have been made on the 10th day of January, A. D. 1818, for the lands described, was a valid, just, and binding title against the United States.

VII. The court erred in decreeing that the petitioners herein were entitled to receive from the United States a patent for all the described tracts of land not sold or otherwise disposed of by the United States and entitled to enter any of the public lands of the United States, liable to private entry at $1.25 per acre, to an amount equal in extent to that which has been sold by the United States within the boundaries of the described tract, according to the sixth section of the act of Congress approved June 22, 1860.

VIII. The court erred in deciding that a claim for lands in West Florida, by virtue of a grant made by the Captain-General of Cuba on the 20th

day of February, 1818, could be confirmed under the provisions of the act of Congress approved June 22, 1860.

IX. The court erred in deciding that a grant of lands in West Florida, made by the Captain-General of Cuba, since the 24th day of January, 1818, was not null and void by virtue of the eighth article of the treaty between the United States and the King of Spain of the 22d day of February, 1819.

X. The court erred in overruling the exception to the report of the master that there had been 1,190,495.45 acres of land, within the boundaries of the grant as described in the petition herein, disposed of by the United States.

ARGUMENT.

I.

The decree should be reversed because the several amendments to the original petition made a different cause of action, which was barred by the limitation of the act of 1860 as extended by the act of 1875.

The provisions of the acts of 1860 and 1872, relating to the time in which suits were to be brought, were statutes of limitation.

> The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within [the time specified] and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are, therefore, to be treated as limitations of the right. (*The Harrisburg*, 199 U. S., 199, 214.)

An amendment of the declaration or complaint, after the statute has fully run, which introduces new parties plaintiff, presenting a new or different cause of action, is barred by the statute.

In *Gray et al.* v. *Trapnall et al.*, 23 Ark., 510, 512, the court said:

> Samson Gray having died in 1835, his heirs brought this suit on the 20th of January, 1858; and tho the youngest of the plaintiffs, Thomas W. Gray, was more than twenty-five years old, the plaintiffs claim that, in consequence of a suit having been begun in Chicot County for this land, against the same defendants, within less than three years after Thomas became twenty-one years old, its dismissal and the beginning of this suit within a year thereafter, all of the plaintiffs are entitled to an adjudication of their rights, free from the effect of the statute of limitations. Before the beginning of the suit in Chicot County, two of the plaintiffs, Jacob S. Gray and Samuel R. Gray, had enjoyed the full time given by the statute in which to assert their right to the land by suit. Being infants at the death of their father, each of them had three years after becoming of age in which to sue, but after that time the interest of each was barred. The opinion of Scott, J., in *Lytle* v. *The State* (17 Ark.), has been adopted by this court, upon full consideration of the proper construction of our statute of limitations, in *Wilder* v. *Mays* (23 Ark.), and it follows that whatever were the rights of the heirs of Samson Gray to the land in controversy, the courts were closed to the two older plaintiffs when they first made their claim by the bill filed in chancery in Chicot Circuit Court.

See in this connection *Lytle et al.* v. *The State*, 17 Ark., 608, 649; *Marstellar* v. *McClean*, 7 Cr., 156; *Bennington* v. *Dinsmore*, 2 Gill (Md. 348); *United States* v. *Martinez*, 196 U. S., 459.

This original suit was filed March 3, 1875, by the heirs of John Forbes to confirm a title to lands claimed by virtue of a grant to John Forbes. The time for the commencement of suits under the statute expired on June 10, 1875. In February, 1876, the heirs of James and John Innerarity asked to intervene in this suit on the ground that the grant was made to John Forbes in trust for himself and the Innerarityes, who were his partners in the house of John Forbes & Co.

This application was denied, tho for what reason is not shown. (It is not pretended the supplied record is complete; the evidence in support of the substitution shows it is not.) It may have been from a misapprehension of the laws of Spain as to the person holding the legal title or from an endeavor to save the rights of the heirs of James and John Innerarity from the bar of the statute. However that may be, nothing further was done until December 14, 1878, when the heirs of John Forbes and of James Innerarity and of John Innerarity presented an amended petition, in which it was stated that the grant originally stated as a grant to John Forbes was a grant to John Forbes & Co., and that John Forbes & Co. was a partnership composed of John Forbes and James and John Innerarity. The allowance of this amend-

ment must have been opposed, for the court in permitting it directed "all rights and exceptions arising under the statute of limitations to be saved."

It seems clear that this suit can not be maintained by the heirs of James and John Innerarity. If the heirs of Forbes and the heirs of Innerarity were tenants in common then the several parties in interest must be brought within the limitation. The heirs of Forbes were within the proper time, if the title can be established; the other heirs were not. Thus, in *United States* v. *The Heirs of James Innerarity* (19 Wall., 595), it was held that the heirs had filed their petition in time, but that Innerarity had no claim in law or equity to the land. The court said, as applicable to the double departure we object to:

> The attempt to set up a claim under this petition or a supplemental petition by Innerarity's heirs in favor of the heirs of John Watkins, can not be sustained. It does not appear that Watkins derived title from Innerarity or that Innerarity ever had any title. The case is simply this: Innerarity's heirs have filed their petition in time, but have no title. Watkins's heirs have a title, but have not filed a petition for its allowance. Watkins's title can not be interposed by the present petitioners. Such practice is unknown. If a suit be commenced by A to recover land or money, he, failing on the merits, can not bring into his suit a new

> plaintiff, especially one whose action, if then commenced, would be barred by the statute of limitations. If otherwise, the same suit can be continued indefinitely, constantly making new plaintiffs, until some one shall be found who has a meritorious claim. It would be a practical abrogation of the limitation of the statute.

Afterwards a joint action was brought by the heirs of Watkins and Mrs. Simpson, assignees of this same Ramos grant (*United States* v. *Watkins*, 7 Otto, 219, 223). Mrs. Simpson filed an amended petition in which she admitted she had sold her share to James Innerarity, but whether in his individual capacity or as partner of Forbes & Co. she could not say; she asked to prosecute the suit for the benefit of the legal representatives of Innerarity. The court said:

> The fact that Simpson and Watkins were tenants in common of undivided moieties in the land, can produce no inconvenience in making a decree in favor of Watkins's heirs for one-half of the amount of land in controversy. * * * By the admission of Melanie Bringier (Mrs. Simpson), she has parted with all title to the lands. It is evident that no decree can be made in her favor. The heirs of Innerarity have already been before the court, and their claims have been rejected.

Assuming, then, that the heirs of the Innerarityss can not prosecute this claim, can the heirs of John

Forbes do so? Their real interest was, for the first time, disclosed in the amendment of 1878, three and a half years after the statutory bar. It is true that, in accordance with the provisions of the seventh section of the act of 1860, in the original petition the report of a board of commissioners is referred to and deposited as an exhibit. But this report is on a claim of John Forbes & Co. (American State Papers, Public Lands, vol. 4, pp. 169, 172, Ed. G. & S., 1859.) By the amendment it is acknowledged that the heirs of Forbes could only recover one-third of the amount of land in the grant. In the original petition they claimed all the lands, but their evidence—the facts reported by the commissioners—showed they were only entitled to a share, without ascertaining what that share was. No decree could have been rendered in their favor for want of certainty in both the claim and the proofs. And when the amendment was offered it made a joint action by the heirs of all the partners in the old firm of Forbes & Co. Even the equities of the heirs of Forbes were no better than the equities of the heirs of the Innerarity's, who were barred.

However, in the event that these amendments could be allowed, there arises the question that the amendment made at the hearing, and upon which the decree was rendered, made an entirely different and irreconcilable cause of action.

The original petition as first amended claimed the lands in controversy by virtue of a grant from

the Captain-General of Cuba, made on the 10th day of January, 1818. The claimants alleged that "the possession and title of John Forbes [& Co.] was specially protected by the eighth article of the treaty of cession." The Spanish (the language of the grantor) reads: "All grants of lands made on or before the 24th of January, 1818, quedaran ratificados, y reconcidas al la personas que esten in possession de aleas: [or are confirmed in possession of them]." They further alleged: "That at no time whatever has a report of land commissioners been made adverse to their claim now presented nor any report suggesting fraud, favoritism, or forgery of any part of the evidence above set forth, nor has their claim at any time been presented to or examined by a court of law or equity, nor has it been acted upon by Congress at any time." They further alleged: "That the eighth article of the cession binds the United States to confirm the title of John Forbes [& Co.] to those lands of which we had possession under a title in all respects perfected at the date of the treaty."

By the amendment at the hearing all these allegations were abandoned. It was acknowledged that there was no grant of January 10, 1818, nor any confirmation by the eighth article of the treaty of 1819. It was asserted that petitioners relied upon a grant made on February 20, 1818, altered so that it purports to have been made on January 10, 1818.

If the court had a discretionary power to allow

such an amendment, it seems strange that it should look with favor upon this application. The *Registro*, thus asked to be used as proof of title in the claimants, is not mentioned in their original pleadings, nor was it introduced in evidence by them. It first appears in the answer as borrowed from the case before Judge Brackenridge in 1830. The paper was taken from the records of that case and presented by the defendant. Its legal effect in each case was to show that the muniment of title declared on was a false, forged, antedated paper.

The arguments and speculations advanced to account for these alterations need not now be adverted to. For the purposes of this argument it is sufficient to say that the radical changes from the original petition created a new cause of action which is barred by the limitation of the acts of 1860 and 1872.

In *Union Pacific R. Co.* v. *Wyler* (158 U. S., 285) Mr. Justice White, speaking for the court, said:

> The general rule is, that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that, as the running of the statute is interrupted, by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to

all matters subsequently alleged, by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies.

The doctrine on this subject is stated in the case of *Sicard* v. *Davis* (6 Pet., 124, ——.) There the plaintiff brought an action of ejectment, in which he laid his demise as having been made by Steven Sicard on January 30, 1815, and at the November term of the court in 1821 he was given leave to amend by laying his demise in the name of the heirs of the original grantee of the lands, Joseph Phillips and others, to whom the land had been conveyed before the execution of the deed under which Sicard acquired his title. This court, speaking thru *Mr. Chief Justice Marshall*, said that "limitations might be pleaded to the second allegation, tho not to the first, because the second count in the declaration being on a demise from a different party asserting a different title was not distinguishable, so far as respects the bar of the act of limitations from a new action."

* * * * *

Other applications of the doctrine may be found in the following cases: *Toby* v. *Allen* (3 Kans., 399); *Hiatt* v. *Auld* (11 Kans., 176); *Rolling Mill* v. *Monka* (107 Ill., 340); *Crofford* v. *Cothran* (2 Sneed, 492); *Flatley* v. *Memphis & C. R. Co.* (9 Heisk., 230);

Dudley v. *Price's* (10 B. Mon., 84); *Buntin* v. *Chicago, R. I. & P. R. Co.* (41 Fed. Rep., 744); *Atlantic & P. R. Co.* v *Laird* (58 Fed. Rep., 760).

Nor do we think this question is in any way affected by the fact that the second amended petition was filed by consent. The consent covered the right to file it, but did not waive the defenses thereto when filed. If the interruption to the running of the statute created by the first summons applied only to the cause of action therein set out, it would have required an express renunciation of the benefit of the statute which had fully operated upon the new cause of action set out in the amended petition—when that petition was filed. In *Sicard's case*, *supra*, altho the amendment had been filed by leave of court, and was, therefore, a bar of the pleadings, it was held that the bar of the statute applied to the new cause of action alleged in the amendment, and the rule there enforced is followed in the other cases cited.

See also *Kendall* v. *United States* (14 Ct. Cls. R., 122; S. C., 107 U. S., 123).

II.

This Claim is Barred by the Former Adjudication Under the Act of May 23, 1828.

After the treaty of February 22, 1819, between Spain and the United States, Congress, in the determination to act liberally in preserving the rights of individuals in private property, and especially

to recognize and carry out the principles of the eighth article of the treaty, past acts, the object of which was to ascertain the titles and claims to lands in Florida: "To separate private property from the public domain, for the double purpose of doing justice to individuals and enabling Congress safely to sell the vacant lands in their newly acquired territories." The first of these acts, past soon after the ratification of the treaty of cession, was the act of May 8, 1822 (3 Stat. L., 709). By the first section it was provided: "That for the purpose of ascertaining the claims and titles to lands within the Territory of Florida, as required by the treaty of the twenty-second of February, one thousand eight hundred and nineteen, there shall be appointed * * * three commissioners, etc." The fourth section enacts:

> That every person, or the heirs or representatives of such persons, claiming titles to lands under any patent, grant, concession, or order of survey, dated previous to the twenty-fourth of January, 1818, which were valid under the Spanish Government, or by the law of nations, and which are not rejected by the treaty ceding the territory of East and West Florida to the United States, shall file, before the commissioners, his, her, or their, claim, setting forth, particularly, its situation and boundaries, if to be ascertained, etc., and said commissioners shall proceed to examine and determine on the validity of said patents, grants, concessions, and orders of survey, agreeably to the laws

> and ordinances heretofore existing, of the governments making the grants, respectively, having due regard, in all Spanish claims, to the conditions and stipulations contained in the eighth article of a treaty concluded at Washington, between his Catholic majesty, and the United States, on the 22d of February, 1819, etc."

Section 5 enacts—

> That the commissioners shall have power to inquire into the justice and validity of the claims filed with them; * * * they shall not have power to confirm any claim or part thereof where the amount claimed is undefined in quantity, or shall exceed 1,000 acres; but in all such cases shall report the testimony, with their opinions, to the Secretary of the Treasury, to be laid before Congress for their determination.

Under this act, John Forbes & Co. presented to the duly appointed commissioners their claim for a tract of land, undefined in quantity, but said to contain about 1,850,000 acres, and in support thereof offered in evidence a copy of a memorial, dated January 5, 1818, to the Captain-General of Cuba and the two Floridas, reciting certain losses which they had sustained from American Indians, and praying a grant of land, "which commences from the creek known as Sweetwater Creek, on the river Apalachicola, and runs directly west as far as the Choctawhatchee, following the course of said river to its mouth, on the bay of St. Rosa,

then eastwardly, winding along the shores of said bay and the sea, to the boundary of the lands on the east of the Apalachicola, formerly ceded to our house by the Indians, and running along the western boundary of said land up the said river to the point of departure."

The memorialists also offered in evidence copies of certain Spanish interlocutory decrees and a grant of the lands prayed for dated January 10, 1818.

The commissioners, after receiving other testitimony not necessary here to detail, submitted the case to Congress for their determination. Their report was transmitted to Congress by the Secretary of the Treasury February 21, 1825. (American State Papers, Public Lands, vol. IV, pp. 155–172.) No action was had upon this report.

These matters are all in evidence in this case on the part of the petitioners.

On the 23d of May, 1828, Congress past "an act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida." (4 Stat. L., 284.) By the sixth section of that act it was provided:

> That all claims to land within the Territory of Florida, embraced by the treaty between Spain and the United States of the 22d of February, 1819, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above

the amount confirmed by this act: and which have not been reported, as antedated or forged by said commissioners, or register and receiver acting as such, shall be received and adjudicated, by the judge of the Superior Court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge, and claimants in the State of Missouri, by act of Congress, approved May 26, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri, and Territory of Arkansas, to institute proceedings to try the validity of their claims": *Provided*, That nothing in this section shall be construed to authorize said judges to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the King of Spain, nor any claim not presented to the commissioners or register and receiver, in conformity to the several acts of Congress, providing for the settlement of private land claims in Florida.

The seventh section provides for an appeal by claimants, "as directed in the act aforesaid, from the decision of the judge of the district, to the Supreme Court of the United States, within four months after the decision shall be pronounced."

The first section of the act of 1824 referred to (4 Stat. L., 52), provides that any person or persons, or their legal representatives, claiming lands, may present a petition to the district court, setting forth,

fully, plainly, and substantially the nature of the claim, and particularly stating the date of the grant, succession, warrant, or order of survey, under which they claim and whether the same has been submitted to the examination of either of the tribunals which have been constituted by law for the adjustment of land titles, and by them reported on unfavorably or recommended for confirmation.

By the second section it was provided that:

> Every petition shall be * * * conducted according to the rules of a court of equity, * * * and the court shall have full power and authority to hear and determine all questions arising in said cause relative to the title of the claimants, the extent, locality, and boundaries of the said claim, or other matters connected therewith, fit and proper to be heard and determined, and, by a final decree, to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto; and the laws and ordinances of the government from which it is alleged to have been derived; and all other questions properly arising between the claimants and the United States; which decree shall, in all cases, refer to the treaty, law, [or] ordinance under which it is confirmed or decreed against; * * * and in all cases the party against whom the judgment or decree of the said district court may be finally given, shall be entitled to an appeal, within

> one year from the time of its rendition, to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties; and, should no appeal be taken, the judgment, or decree of the said district court shall, in like manner, be final and conclusive.

The third section of the same act enacts:

> That the evidence which has been received by the different tribunals which have been constituted and appointed by law to receive such evidence, and to report the same to the Secretary of the Treasury, or to the Commissioner of the General Land Office, upon all claims presented to them, respectively, shall be received and admitted in evidence for or against the United States, in all trials under this act, when the person testifying is dead, or beyond the reach of the court's process; together with such other testimony, etc.

Under the provisions of these statutes, on the 2d day of December, 1828, John Innerarity, on behalf of John Forbes & Co., filed a claim for the land above mentioned. On March 24, 1829, an amended petition was filed by the surviving partners of the firm of John Forbes & Co. and the heirs of John Forbes, in which the report of the commissioners was referred to and made part of the petition. The grant of Cienfuegos was relied on as it appeared in the exemplification before the board; and it was expressly averred that the claim had not been annulled by the treaty of February

22, 1819, nor by the decree of the King of Spain ratifying the same, and was not reported by the commissioners as either antedated or forged. The petitioners claimed that the grant was made in accordance with the laws of Spain, etc., and was guaranteed by the eighth article of the treaty.

An answer was filed in which, among many other averments, was a denial of the validity of the grant and a demand for the production of the original.

At the trial the original, obtained from the archives at Havana by R. H. Call, special commissary and attorney for the United States, was presented and proved. I use the term "original" in the acceptation of the term in our own language as the title paper executed by the parties. This was, under Spanish laws, retained in the public offices and called the *registro*. Judge Brackenridge, before whom the case was heard, in his opinion says:

> The registro is the original minutes, or first draft, which remains in the office of the escribano, notary, or other officer, for safe-keeping, and is that from which the original is made out and transcribed, and by which any doubts that may arise on the original are to be determined.
>
> A public instrument is divided into three classes: The original draft, register, or protocol (registro), the original, and the copy. The register is the original draft or writing, which is delivered and remains in the pos-

> session of the escribano, which we also call protocol, by which doubts are determined that may be offered to the instruments which are copied from it. (White, New Recopilacion, quoting authorities, 207.)

This *registro* was produced by General Call in obedience to a subpena duces tecum, granted at the request of the claimants. On September 25, 1830, during the trial, solicitors for petitioners notified the defendant they would rely on this grant. On the same day, after inspection, they gave notice that the document was not the one they contemplated, and they would insist it be excluded from being received in evidence.

The *registro* was received, and upon examination the district judge determined that it contained alterations in the dates of the orders by the Spanish officers and of the grant, which, under the Spanish law, there being no salvado or notation of the errors and alterations, rendered the instrument null and void. He further said that being fully satisfied the claimants had no legal grant prior to the 24th of January, 1818, he felt bound to reject the petition. The decree was that for the reasons set forth in the opinion the prayer of the petitioners for the confirmation of the said claim to the said land be refused and rejected.

From this judgment and decree no appeal was taken. All the parties acquiesced. That the claimants were taken by surprise, on the introduction of the original draft, is probable. But that there was

any other reason for failure to prosecute their suit than belief in the invalidity of the grant seems also probable. The tract, according to their own description, bordered on the land in another grant to the same parties, comprising 1,200,000 acres, which was, at the same time, the subject of a trial before the superior court of middle Florida. James Innerarity was one of the claimants in both suits. The latter, after an adverse decision, was appealed by the petitioners to the Supreme Court (*Mitchell et al.* v. *United States*, 9 Pet., 711). The decree in the territorial court was on November 2, 1830, only four days before the judgment in the former suit not appealed.

These matters of former adjudication were pleaded in this suit and issue joined. Proofs were presented by the petitioners to sustain the grant, and by the defendant to sustain the plea.

Against the efficacy of this plea several positions are assumed by petitioners. It is urged that Judge Brackenridge did not and could not decide anything further than that the grant was made after January 24, 1818. But this is a misapprehension of the act of 1828. That statute provided that the judge should receive and adjudicate the claims according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge and claimants by the act of 1824. The very first thing required of the claimants was that they should "particularly state the date of the grant, concession, warrant, or order of

survey under which they claim." The proviso in the 6th section of the act of 1828 does forbid the judges to take cognizance of any claim annulled by the treaty of 1819. But these statutes gave the judge jurisdiction "by a final decree, to settle and determine the question of the validity of the title according to the law of nations, the stipulations of any treaty and proceedings under the same, the several acts of Congress in relation thereto, and the laws and ordinances of the Government from which it is alleged to have been derived, and all other questions arising between the claimants and the United States."

This claim as presented was not annulled by the proviso of the treaty. The question directly involved in the issue was the validity of the grant. By the evidence presented by the petitioners the grant must have been confirmed. It was only upon the exhibition of the *registro* that the alterations were shown. No effort was made to account for them. They showed that a paper purporting to be a grant of January 10, 1818, had been altered from a paper in which the date had been February 20, 1818. The decree was that confirmation be refused and rejected. The reasons given were, first, that the alterations were of a nature to affect the very existence of the grant. This may refer to the fact that without the alteration the grant was annulled by the treaty.

But there was a second reason, that the instrument itself was, by virtue of the alterations, null

and void; hence there was no title, the title having no existence except in the grant. And this covers a grant claimed to have been made on February 20, as well as a grant claimed to have been made on January 10. Upon this ground rested the decree. It was because there was no grant at all that it followed there was no grant before the 24th of January. (*State's Lessee* v. *Spencer*, 1 Pet., 552.) The conclusion of law, it may be remarked in passing, was correct by the Spanish, the Roman civil, and the common law. (Greenleaf Evidence, sec. 564, *n*.) If the decree was deemed erroneous an appeal could have been taken. If not taken, the statute expressly decided the decree was final and conclusive. (Bigelow Estoppel, 94.)

This case, as brought in the District Court, was exactly the case brought before the Judge of the Superior Court in 1828. The evidence introduced was exactly the same. The facts as to the time of the grant were the same. Can the petitioners, under this late amendment, destroy the force of the former adjudication by proceeding upon a different theory? It is not at all similar to a case where a plaintiff in ejectment sues to recover land and fails, upon a title which he then had, and then sues upon a subsequently acquired title. Nor are these petitioners in the condition of those claimants who continuously asserted a title which had been declared invalid but which by legislation was subsequently permitted to be established. If they had claimed under a grant of February 20, 1818,

and that title had been, as it must have been, decided invalid by the 8th article of the treaty, a statute might validate that grant and permit them to recover, and the former adjudication would not be a bar. But that is not this case.

It is no answer to this contention to say that the original grantors did not have the *registro* in their possession and could not, therefore, have made the changes. If these were not made actually by them, or at their instigation, they were with their knowledge and acquiescence. They were immediately furnished with the exemplification and order for possession. These showed the true dates. A grant of February 20, 1818, was not annulled until the signing of the treaty, February 22, 1819. When that fact became certain, or, if you please, the necessity for the alteration became imminent, the dates were completely changed and a grant of February, if such existed, was destroyed.

III.

The Act of June 22, 1860, as Extended by the Act of June 10, 1872, Does not Authorize the Confirmation of a Grant of Lands in Florida, East of the Perdido River, Made After the 24th of January, 1818.

The amendment declaring upon a grant of February 20, 1818, and the contention of counsel are based upon the hypothesis that some rights have been created on behalf of claimants by the act of 1860 which could not otherwise have existed.

In *Scull* v. *United States* (98 U. S., 410), Mr. Justice Miller said:

> The history of the relation of the Government of the United States to the claims for lands asserted under rights derived from the Spanish and French Governments, prior to the cession of Louisiana and Florida to our Government, as it is found in the treaties, the acts of Congress, and the judicial decisions of the American tribunals, is given very fully and with accuracy in the opinion of this court in the case of *The United States* v. *Lynde* (11 Wall., 632), and will be referred to now without repeating it. The necessity and the policy of the act of 1860 (12 Stat. L., 85) are there fully considered.

As the last resting place of these petitioners, and of any others in like situation, is upon this act of 1860, it is appropriate and necessary to refer to the judicial determination of the scope of that act.

In Lynde's case (*supra*), Mr. Justice Bradley, delivering the opinion, gives a historical statement of the events which led to the passage of the act.

> Louisiana, as possessed by the French, prior to 1763, embraced not only the entire territory west of the Mississippi, but also extended east of that river, along the Gulf of Mexico, as far as the Perdido, the present boundary between Alabama and Florida. By the treaties of 1763 France ceded the latter portion, lying east of the Mississippi, except the city and island of New Orleans, to Great Britain, and the residue to Spain.

Subsequently (in 1783) Spain acquired the part ceded to Great Britain, and thus became possessed of the entire territory on our western and southern borders. On the 1st of October, 1800, a secret treaty was made at St. Ildefonso, between Spain and Bonaparte, then first consul, by which Spain agreed, on certain conditions to be performed, to retrocede to the French Republic "the colony or province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it ought to be after the Treaties subsequently entered into between Spain and other States."

The ambiguity of this last expression was the cause of the subsequent misunderstanding between Spain and the United States. Did it mean that Spain was to retrocede to France all the territory which the latter had formerly possessed under the name of Louisiana, or only so much as remained after the separation of West Florida therefrom, and the cession thereof to Great Britain? The United States contended the former, Spain the latter.

The importance of this question arose from the fact that the cession of Louisiana by Bonaparte to the United States included in precise terms what had been retroceded by Spain to France. The treaty of April 30, 1803, after reciting the exact language of the treaty of St. Ildefonso, describing the colony or province of Louisiana, as above stated, ceded "the said territory, with all its

rights and appurtenances, as fully and in the same manner as they had been acquired by the French Republic in virtue of the above-mentioned treaty with His Catholic Majesty." In accordance with her construction of the treaty of St. Ildefonso, Spain refused to surrender possession of the territory east of the Mississippi and Iberville rivers which she had acquired from Great Britain, and which the English had named West Florida, and she retained possession of it and exercised full sovereignty over it for many years afterwards.

Notwithstanding this refusal of Spain to deliver up West Florida, the United States, thru the executive and legislative departments of the Government, always claimed that it was covered by the two Treaties of Cession, and insisted that it rightfully belonged to them, tho no demonstrations were made to dispossess the Spanish authorities until 1810, when President Madison issued a proclamation directing that possession should be taken, but at the same time declared that the right thereto should remain, as it had continued, a subject for amicable negotiation with the Spanish Government. Possession was taken by the United States accordingly.

During the period that Spain remained in possession, her authorities continued to grant lands, not only in small parcels to actual settlers, under her colonization laws, but in large tracts to speculators and favorites.

> From 1803 to 1806, inclusive, the Spanish Intendant, Morales, made many such grants (of which the grant in question was one) and which have ever since been the subject of much litigation and dispute, never being recognized as valid by our authorities, unless so recognized by the act of 1860, hereafter referred to.

The opinion then refers to the act of March 26, 1804, creating the Territory of Orleans and the District of Louisiana, by the fourteenth section of which all grants of land within the ceded territories the title whereof was at the date of the treaty of St. Ildefonso (October 1, 1800) in the Crown, Government, or nation of Spain, are declared void, except *bona fide* grants made to actual settlers prior to December 20, 1803, etc. That was the day on which the commissioner of France delivered to the commissioners of the United States formal possession of the province of Louisiana. This act extended to West Florida (so-called) as well as to Louisiana, and as a part thereof.

The opinion then cites the proclamation of President Madison, in 1810, in which it is declared that this territory eastward of the Mississippi and extending to the Perdido had at all times been claimed and considered as being within the colony of Louisiana conveyed by the treaty of Paris of 1803; and Governor Claiborne, governor of the Orleans Territory, was ordered to take possession of the same.

Then the act of April 25, 1812, is referred to, whereby commissioners were appointed to investigate all the titles and claims to lands in that territory; and also the opinion of the commissioners that the territory was a part of Louisiana, ceded to the United States in 1803, and that the authority of Spain over the same had ceased by the treaty of St. Ildefonso.

The retrospect then brought into consideration the eighth article of the treaty between the United States and Spain of February 22, 1819. It was said: "When this treaty came before the courts it was held that it furnished no aid to the disputed claims, since it only guaranteed grants made by the King of Spain in the territory ceded by that Treaty; and the territory ceded only embraced such territory as belonged to the King of Spain; and, as the United States held that the disputed territory did not belong to him, no grants made by him therein were confirmed by the treaty." The cases *Foster* v. *Neilson* (2 Pet., 253), *Arredondo* v. *United States* (6 Pet., 691), and *United States* v. *Percheman* (7 Pet., 51) were reviewed and cited as establishing this principle.

The learned justice then goes on to examine the action of Congress in "attempts to secure the recognition of these Spanish grants." The act of June 17, 1844, extended the provisions of the act of May 26, 1824, relating to land titles in Missouri, to Louisiana and Arkansas, and the district between the Mississippi and Perdido rivers, and the district

courts were invested with jurisdiction over land claims originating with either French, Spanish, or British authorities (5 Stat. L., 676). This act authorized any person claiming land by virtue of any French or Spanish grant, concession, warrant or order of survey legally made or issued before the 10th of March, 1804, which was protected or secured by the treaty with France of April 30, 1803, and which might have been perfected into a complete title had not the sovereignty been changed to present a case to the district court, etc.

Cases were brought and rejected upon the ground that the act related to inchoate and imperfect titles, and was intended to give a means of completing them.

> The court reaffirmed *Foster* v. *Neilson*, and held that Spain could not make any valid grant in the disputed territory after the treaty of St. Ildefonso, and that the act of March 26, 1804, which had never been repealed, had pronounced all such grants void. The court adhered to the same views in *United States* v. *D'Auterive* (10 How., 609); *United States* v. *Phila. and New Orleans* (11 How., 609); *Montault* v. *United States* (12 How., 47); *United States* v. *Castant* (12 How., 437); and a number of other cases in the same term, including the case now before the court. Thesecases were decided in 1852.
>
> In view of this long course of decisions, all to the same purport, it must be considered as judicially settled in this court that Louisiana, as ceded to the United States in 1803,

> embraced the territory between the Mississippi and Perdido rivers, and that our Government had a perfect legal right, whatever may have been its moral or honorary obligations, to ignore all grants made by the Spanish authorities after the treaty of St. Ildefonso went into effect. It must also be regarded as judicially settled that the treaty of 1819 confirmed grants of lands made in the Floridas, east of the Perdido, but not those made to the west of that river unless made to actual settlers or made before the treaty of St. Ildefonso went into effect. If the Political departments of the Government felt bound, from considerations of honor and good faith, or from motives of conciliation and policy, to give effect to any other grants, it was for them to do so.

The claim of Lynde's heirs was for lands east of the Mississippi but west of the Perdido and which were a part of the disputed territory. This claim of Forbes's heirs is for lands east of the Perdido and therefore not in the disputed territory. This difference becomes material when we come to consider the purpose and the policy of the act of 1860. Because, as Mr. Justice Bradley said, in this same case (p. 644):

> After the unsuccessful attempt made in the courts, as last referred to, under the Missouri act of 1824, the subject was again brought to the attention of Congress in May, 1858. Mr. Benjamin, who had been counsel for the claimant in the last cases, made a

> report to the Senate as chairman of the Committee on Private Land Claims, and submitted a bill for the relief of the claimants. This report contained a very full history of the treaties and litigation, giving a favorable view of the Spanish side of the question. Suffice it to say, in consequence of this report, Congress passed the act of June 22, 1860.

This report is Senate Report No. 279, Thirty-fifth Congress, first session, vol. 2, 1857–58.

Regarding the above expression of the court, and especially the relation, if any, of this legislation to the eighth article of the treaty of 1818, an examination of the report and of the records of the negotiations leading up to the treaty becomes important. (*Binns* v. *United States*, 194 U. S., 486, 495.)

It is not to be presumed that all the conclusions arrived at by the committee were incorporated in the act. The declaration that even if the United States had the right to the disputed territory, grants made therein by the sovereign in possession were valid and conveyed a valid title to the grantee was not affirmed. On the contrary, what was provided for and assented to was confirmation, not recognition.

After an elaborate statement and argument, which, after all, was an appeal to the honor of the Government to acknowledge a moral obligation, the committee urged that the claims before them were protected by the faith of the treaty of

1819. It must be kept in mind that these claims were in the disputed territory and were all upon grants, concessions, or warrants of survey made prior to January 24, 1818. By the second article of the treaty "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of east and west Florida."

The eighth article was the subject of much controversy, which was not closed until February 22, 1819. The following statement of the preliminary negotiations to the acceptance of this article is taken from the abstract in the report and from the original documents in American State Papers. The conduct of the affairs, commenced at Madrid, was removed to Washington. The negotiations had been long interrupted by complications growing out of the Indian troubles and the invasion of Florida by General Jackson, but were renewed in 1818 between John Quincy Adams, the American Secretary of State, and the Chevalier de Onis, the Spanish minister. Mr. Adams made, January 16, 1818, these propositions for a settlement of all outstanding difficulties with Spain, including not only the eastern boundary but the western boundary of Louisiana, and the claims of our citizens to indemnity for spoliations:

1. Spain to cede all her claims to territory eastward of the Mississippi.

2 and 3. * * *

4. * * * *No grants of land subsequent to the 11th August, 1802, to be valid.* (3 Am. State Papers, For. Rel., 464.)

On the 24th January, 1818, the Spanish minister answered: "Nor can I omit to declare to you, sir, that the pretension of annulling the grants of lands in Florida since August, 1802, would be *in opposition to all the principles of justice.* These grants are made in a lawful manner," etc.

Mr. Adams was put on his guard by a letter from Mr. Erving, our minister, dated at Madrid on the 10th February, 1818: "The King has lately made large grants of land in east Florida to several of his favorites, and I am credibly informed that within these few days he has, by a sweeping grant, given all the remainder to the Duke of Alagon, captain of his guards, and the Count of Punon Rostro, one of his chamberlains. This is, perhaps, his mode of preparing for a *cheap* cession of the territory to the United States." (3 For. Rel., 509.)

On the 26th April, 1818, he again writes, that in reference to a cession of Florida, in compensation of American claims, he had told the Spanish minister that these claims would have to be paid out of the sale of the lands.

"Now, the King had lately given all those lands away (as I had duly informed my Government); to complete the transaction it would, therefore, be absolutely necessary that the whole of those grants should be canceled." And on the 14th May, 1818,

he announces "the council sent orders to the Duke of Alagon and the Count of Punon Rostro, directing them not to make sales of the lands granted to them." (3 For. Rel., pp. 511–512.)

On the 18th July, 1818, Mr. Erving says to Mr. Pizarro, the Spanish secretary of state, "that it is quite certain that the United States can not receive Florida as indemnity for its reclamations, *if all the cessions to individuals since the date of the convention* (1802) are not annulled." (3 For. Rel., p. 516.)

Finally, the following were the propositions of the negotiators who concluded the treaty in Washington. The Chevalier Onis proposed, on 24th October, 1818, this clause:

"His Catholic Majesty, * * * to put an end to the differences which now exist between the two Governments, cedes to them (the United States), in full property and sovereignty, the provinces of East and West Florida, with all their towns and forts. * * * *the donation or sales of* lands made by the Government of His Majesty, or by legal authorities, until this time, are nevertheless to be recognized as valid." (3 For. Rel., p. 530.)

Mr. Adams answers, 31st October, 1818: "Neither can the United States recognize as valid all the grants of land until this time. * * * It is well known to you, sir, that notice has been given by the minister of the United States in Spain to your Government that *all the grants of land lately*

alleged to have been made by your Government within those territories must be canceled, unless your Government should provide some other adequate fund from which the claims above referred to of the United States and their citizens may be satisfied."

Mr. Adams then proposes "that all grants of land in any part of the territories to be ceded by Spain to the United States subsequent to the year 1802 are to be held null and void" (p. 531).

Don Onis replies, 16th November, 1818: "To this modification, in its absolute sense, I can not assent, inasmuch as it is offensive to the dignity and imprescriptible rights of the Crown of Spain, which, as the legitimate owner of *both the Floridas*, had a right to dispose of those lands as it pleased; and further, as the said modification would be productive of incalculable injury to the *bona fide* possessors who have acquired, settled, and improved those tracts of land.

"*The extent of what I can agree to is* that the *late* grants made by His Majesty in the Floridas, *since the 24th January last*, the date of my first note announcing His Majesty's willingness to cede them to the United States, shall be declared null and void." * * * (p. 532).

Mr. Onis then submitted a draft of an article and Mr. Adams a counter draft, the article being No. 9 in the project of a treaty by Mr. Onis, and No. 8 in the counter project of Mr. Adams.

Mr. Onis. Article 9.

All the grants of lands made by His Catholic Majesty, or by his legitimate authority, in the aforesaid two territories of Florida, and others which His Majesty cedes to the United States, shall be confirmed and acknowledged as valid, excepting those grants which may have been made after the 24th January of last year, the date that the first proposals were made for the cession of these provinces, which shall be held null, in consideration of the grantees not having complied with the conditions of the cession.

Mr. Adams. Article 8.

All grants of land made by or in the name of His Catholic Majesty in the aforesaid territories, after the 24th January, 1818, shall be null, the conditions of the said grants not having been performed by the grantees. *All* grants made *before that date* by His Catholic Majesty, or by his legitimate authorities in the said territories, *the conditions of which shall have been performed by the grantees, according to the tenor of the respective grants*, and *none other*, shall be confirmed and acknowledged as valid.

When Mr. Adams's counter-projét appeared, the Chevalier Onis said on this article that it could not be varied from what was contained in his projét, as the object of the last clause therein is merely to save the honor and dignity of the sovereignty of his Catholic Majesty; and on this objection Mr. Adams agreed to the Chevalier's proposal with the following explanation: "That all the grants of land which shall not be annulled by this convention are valid to the same extent as they are binding on his Catholic Majesty." (3 For. Rel., 619, 620, 621.)

By comparing these different projéts, the words in italics in the counter-projét of Mr. Adams, and finally the words just quoted, the whole purpose of the clause is apparent. The United States were guarding themselves from any admission of the validity of such enormous *colonization* grants as were usually made by Spain, on condition of settlement and cultivation, of which they had recently been warned in the examples of the grants to the Duke of Alagon and Count of Punon Rostro. There was no danger as regarded *bona fide* sales or grants to settlers. Hence the requirement of Mr. Adams to insert words authorizing the United States to avail themselves of a noncompliance with conditions by grantees; hence his insertion of the provision that the titles should have the *same* validity against the United States as against Spain.

Before the ratification of the treaty, the United States, however, required of Spain a special acknowledgment of the nullity of the three principal grants made subsequent to the date indicated in the treaty, and it was accordingly ratified on the 24th October, 1820, with a special declaration that the three grants made in favor of Alagon, Punon Rostro, and Vargas were not ratified by the treaty. Now, the grant to Vargas was of land *west of the Perdido River, in the disputed territory*, and the inference is irresistible that, in the opinion of the Government, the title of Vargas would have been ratified by the treaty, unless excepted by special provision.

Mr. De Onis being at this time confined by indisposition, at his request Mr. Hyde de Neuville, the French minister, whose good offices were appreciated by both Governments, had a personal interview with Mr. Adams on February 15, at which there was a full and free discussion of the projet and counter-projet. Immediately after this interview, Mr. De Neuville prepared a paper in which are noted the objections of Mr. De Onis to parts of the counter-projet, the replies to those objections by the Secretary of State, and the points to which both parties were agreed. The differences were speedily and in a cordial spirit settled (4 For. Rel., 621, 622). On the 22d of February the treaty was signed. The eighth article, as agreed upon, is as follows:

> All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States shall be ratified and confirmed to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstanes of the Spanish nation and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants shall complete them within the terms limited in the same, respectively, from the date of this

> treaty; in default of which the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas was made, are hereby declared and agreed to be null and void.

It was subsequently determined by the Supreme Court that the words "shall be ratified and confirmed" in this article must be understood as expressing "shall remain ratified and confirmed," so that the words should be the same in confirming as in annulling grants. (*United States* v. *Arredondo*, 6 Pet., 741; *United States* v. *Percheman*, 7 Pet., 50, 88.)

This court has repeatedly had occasion to construe the terms of the 8th article before and in connection with statutes for the adjustment and settlement of private land claims in Florida. It may be generally remarked that these statutes all recognized the binding force of the treaty, both as confirming and annulling grants. It was enacted in them that titles to be ascertained should be "dated previous to the 24th of January, 1818;" "land embraced by the treaty between Spain and the United States of the 22d of February, 1819;" "no judge shall take cognizance of any claim annulled by the said treaty." But these statutes referred only to lands east of the Perdido. The territory west of that river was held by another title. The contention that grants in that coun-

try were confirmed by the 8th article was held unfounded. They were subject to disabilities exprest in the act of 1804.

In *Foster and Elam* v. *Neilson* (2 Pet., 253), Mr. Chief Justice Marshall, speaking of the eighth article, said:

> The insertion of these words (which belong to him—in the second article) materially affects the construction of the article. They can not be rejected as surplusage. They have a plain meaning, and that meaning can be no other than to limit the extent of the cession. We can not say, that they were inserted carelessly or unadvisedly, and must understand them according to their obvious import.
>
> It is not improbable, that terms were selected, which might not compromise the dignity of either Government, and which each might understand, consistently with its former pretensions. But if a court of the United States would have been bound, under the state of things existing at the signature of the treaty, to consider the territory then composing a part of the State of Louisiana, as rightfully belonging to the United States, it would be difficult to construe this article into an admission that it belonged rightfully to his Catholic majesty.
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> * * *
>
> A part of West Florida lay east of the Perdido, and to that the right of his Catholic Majesty was acknowledged. There was, then, an ample subject on which the

words of the cession might operate, without discarding those which limit its general expressions.

In *Garcia* v. *Lee* (12 Pet., 511, 520) this court said:

> The case of *Foster* v. *Neilson* decides this case. It decides, that the territory in which this land was situated belonged to the United States at the time that this grant was made by the Spanish authority; it decides that this grant is not embraced by the eighth article of the treaty which ceded the Floridas to the United States; that the stipulations in that article are confined to the territory which belonged to Spain at the time of the cession, according to the American construction of the treaty; and that the exception of the three grants made in the ratification of this treaty by the King of Spain, can not enlarge the meaning of the words used in the eighth article; and can not, in the language of the court, "extend them to embrace grants not otherwise intended to be confirmed;" or grants "which it (the American Government) has proclaimed to be void, as being for lands within the American territory." These principles, thus settled by this court, cover the whole ground now in controversy.

Keeping in view, then, the history of the negotiations which resulted in the incorporation of the eighth article in the treaty, these statutes past for the adjustment of land titles in Florida, and these judicial decisions, how can the conclusion be

reached that it was the intention of the act of 1860 to annul that article? And these petitioners can not recover upon the grant recently set up unless that article is abrogated. The treaty affirmed and declared null and void all grants with reference to the date of January 24. The lands embraced in the annulled grants were absolutely ceded to the United States by the second article. There is no such language of designation in the treaties of St. Ildefonso and the treaty of Paris of 1803. Even the limits of Louisiana and Florida were not determined. "The name of Florida (says Marbois, p. 284) could not have been inserted in the treaty (of 1803) without preparing great difficulties for the future." The obscurity in the language, which Napoleon welcomed, was the cause of much dispute and litigation arising from uncertainties of titles. Many statutes were past in efforts to settle these troubles and adjust titles in the disputed territory upon just and equitable principles. (Mar. 26, 1804, 2 Stat. L., 283; Mar. 2, 1805, 2 Stat. L., 324; Mar. 23, 1807, 2 Stat. L., 440; Apr. 23, 1812, 2 Stat. L., 713; Mar. 3, 1819, 3 Stat. L., 528; June 17, 1844, 5 Stat. L., 676.)

At last, these statutes not having accomplished what petitioners had persistently sought, and not having afforded that equitable right to which they asserted they were entitled, Congress, in its bounty, past the act of 1860. Notwithstanding the initiative of the act, it is not contended that enforceable

claims are confined to those in the disputed territory—the territory between the Mississippi and the Perdido. Such were the claims of the original memorialists upon which the Senate committee made the report, thru Mr. Benjamin, which was the basis of the act. But afterwards others were included. The act as framed was intended to give the benefit of this relief to any persons having claims resting upon the same or similar circumstances; and further, by a comprehensive extension, "to provide for the *final* adjustment of private land claims in the States of Florida, Louisiana, and Missouri." It is significant that the parts of Mississippi and Alabama, which had been taken from the territory of West Florida (so called), upon the admission of those States into the Union, and which were in the disputed territory, were not embraced in the act. So also as to Arkansas, in which so many Spanish grants had been given. It is more than probable that the representatives of these States feared the effect of efforts to disturb titles which had been substantially settled under previous legislation.

Contemplating all these things, is it not beyond cavil or quibble that this act was past in sequence of the acts we have referred to and in furtherance of a policy which was always within the same expressly limited lines? Broad as is the language, in permitting the Government to be sued; in permitting facts heretofore found to be accepted; in permitting, if judgment goes for

petitioners and the Government had parted with the title to the lands, scrip to be issued locatable upon any public lands, it is respectfully submitted there was no intention on the part of Congress to change or affect any of the stipulations or exceptions of the treaty of 1819.

The first article of the act provides:

> That any person or persons, and the legal representatives of any person or persons, who claim any lands lying within the States of Florida, Louisiana, or Missouri, by virtue of grant, concession, order of survey, permission to settle, or other written evidence of title, emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory in which the lands so claimed are situated * * *

are authorized to apply to commissioners, under the terms mentioned, for confirmation of their titles.

The eleventh section, under which this action is brought, provides that in case of such a claim as mentioned in the first section, where the lands have not been in possession and cultivated for twenty years "and where such lands are claimed by complete grant or concession, or order of survey duly executed, or by other mode of investiture of the title thereto in the original claimant or claim-

ants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses, and distances, by the competent authority, *prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the foreign governments from which it emanated claimed sovereignty over or had the actual possession of such territory*," the claimants might proceed in the District Court.

The question primarily arises, What is the character of claim intended to be sustained by this act? It is only reasonable to conclude that this claim must rest upon some right, not necessarily legal, but at least equitable, which imposes an honorable or moral obligation upon the present Government to recognize it. It must not be an illusory or unfounded claim. It must be of a substantial character and analogous to those rights which are protected by the laws and practises of civilized nations.

The language used shows this: "Bearing date prior to the cession of the territory, *or* where such title was created and perfected during the period while the foreign governments claimed sovereignty over or had the actual possession of the territory." This latter clause, undoubtedly, had reference to complete titles in the disputed territory. It comprehends the acts of a *de facto* in contradistinction and antagonism to a *de jure* government. It would

not be proper for the political branch of this Government to speak of Spain in the Floridas east of the Perdido, prior to the cession, as *claiming* sovereignty and having *actual* possession. She had sovereignty and possession, notorious and undisputed. The Government was both *de facto* and *de jure*, a Government existing and acknowledged thruout the world.

The words, "prior to the cession to the United States of the territory," when applied to the confirmation of titles to lands ceded by the treaty of 1819, under the American construction, must allude to that object of the act, "for the *final* adjustment of private land claims in Florida." The purpose was to confirm, not to create, titles. The suit provided for was "substantially an action of ejectment, with the bar of the statute of limitations removed, the United States having a constructive possession for the defendant." (*Scull* v. *United States*, 8 Otto, 410.) The act was the last of a series *in pari materia*. It must be construed with the others and with reference to the treaty. Had there been any intention to affect the article annulling grants, Congress would have said so in unmistakable language. (Cherokee Tobacco, 11 Wall., 616.) So radical a departure from all the past policy of the Government would not have been left to an implication which, in its results, might be doubtful and uncertain. All the acts have been in observance of the treaty stipulations.

It has been said that perfect grants, made before the treaty became effective, were not annulled by the eighth article. It is asserted that vested rights of property were evidenced by the grant, that it was not intended to divest these rights by the contracting parties, and that it was not in the power of the King of Spain or of the United States to do so, if either had so intended. No rights of property in these petitioners are involved, as far as the United States are concerned. At the time of the ratification of the treaty and the delivery of possession Forbes & Co. had no rights of property in these lands. (*Ely* v. *United States*, 171 U. S., 220, 239; *United States* v. *Green*, 185 U. S., 256, 269.) Until that time the territory was in the possession and in the absolute authority of the King of Spain. He had previously annulled the Forbes grant. Under the laws of Spain he had this right and power. (*United States* v. *Arredondo*, 6 Pet., 691, 714.)

This question has been before this court. (*Doe* v. *Braden*, 16 Pet., 656.) The only grants we know of coming within the annulment of the eighth article, other than this one set up in petitioner's amendment, are the grants made to the Duke of Alagon, the Count of Punon Rostro, and Don Pedro de Vargas. These grants, made in February and April, 1818, were royal grants, made by the King himself, and stand, as far as the treaty is concerned, upon the same footing as a grant of February 18, 1818. (*Foster and Elam* v. *Neilson*,

supra.) Since the signing of the treaty and its ratification, no grant bearing date after the 24th of January, 1818, has ever been heard of or known to exist in Congress or in the courts.

The case last cited was an action of ejectment to recover lands in east Florida. The plaintiff claimed title under the grant to the Duke of Alagon. A reason given for the stipulation in the ratification was that the Duke intended to rely upon a royal order of December 17, 1817, as being sufficient to convey the land, altho the grant was on February 6, 1818. Upon the relation of the declaration in the ratification to the annulment in the article and the force of the annulment the court said:

> For it is too plain for argument that where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged—the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. * * *
>
> In this case the King of Spain has by the treaty stipulated that the grant to the Duke of Alagon, previously made by him, had been and remained annulled, and that neither the Duke of Alagon nor any person claiming under him could avail himself of

this grant. It was for the President and Senate to determine whether the King, by the constitution and laws of Spain, was authorized to make this stipulation and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact, and ratifying the treaty which contains it. The constituted and legitimate authority of the United States, therefore, has acquired and received this land as public property. In that character it became a part of the United States, and subject to, and governed by their laws. And as the treaty is by the Constitution the supreme law, and that law declared it public domain when it came into the possession of the United States, the courts of justice are bound so to regard it and treat it, and can not sanction any title not derived from the United States.

Nor can the plaintiff's claim be supported unless he can maintain that a court of justice may inquire whether the President and Senate were not mistaken as to the authority of the Spanish monarch in this respect; or knowingly sanctioned any act of injustice committed by him upon an individual in violation of the laws of Spain. But it is evident that such a proposition can find no support in the Constitution of the United States; nor in the jurisprudence of any country where the judicial and political powers are separated and placed in different hands. Certainly no judicial tribunal in the United

States ever claimed it, or supposed it possessed it.

The plaintiff seems to suppose that he has a stronger title than that of the Duke of Alagon. It is alleged that the Duke of Alagon, on the 29th of May, 1819, conveyed the greater part of the land granted to him by the King of Spain to Richard S. Hackley, a citizen of the United States. This deed to Hackley was after the signature of the treaty and before the exchange of ratifications, and the plaintiff claims thru Hackley, and contends that this American citizenship protected his title.

But if the deed from the Duke of Alagon to a citizen of the United States was valid by the laws of Spain, and vested the Spanish title in Hackley; yet the land in his hands remained subject to the Spanish law and the authority and power of the Spanish Government as fully as if it had continued the property of the original grantee. Hackley derived no title from the United States, nor were his rights in the land, if he had any, regulated by the laws of the United States, nor under their protection. It was a part of the territory of Spain, and in her possession and under her government, until the ratifications of the treaty were exchanged. And until that time the rights of the individual owner, and the extent of authority which the Government might lawfully exercise over it, depended altogether upon the laws of Spain, and whatever rights

> he may have had under the deed or the Duke of Alagon, they were extinguished by the government from which he held them while the land remained a part of its territory and subject to its laws. It was public domain when it came to the possession of the United States, and he had then no rights in it. (*Doe, ex dem. Clark, et al.* v. *Braden*, *16 How., 656–659.*)

If the grant to Forbes & Co. can be confirmed by virtue of broad provisions in this act, why not the three specified grants? By what process are you going to split up and discriminate equal stipulations? Besides this, the lands described in the Forbes grant of February 20, 1818, are included in the grant to Punon Nostro of February 6, 1818 (Clark's Land Laws, 68–71). Without stopping to remark that the Captain-General of Cuba could not grant lands in the name of the King, which had previously been granted by the King himself, we may ask by what hocus-pocus of statutory construction can it be held that, under this act, the grant to Forbes may be confirmed but the three grants can not be? Yet none ever contended or ever will contend that the intention of the statutes was to confirm the latter.

In the leading case of *Lynde's heirs* v. *United States* (*supra*) Mr. Justice Bradley refers to these and kindred matters, and sums up as follows:

> We can not avoid the conclusion, therefore, that the Act of June 22, 1860, was in-

> tended to validate all grants which were made by the Spanish Government to *bona fide* grantees of lands in the disputed territory whilst the Government remained in possession of the territory and claimed sovereignty over it, subject, of course, to the express exceptions of the treaty of 1819, and the supplementary declaration of the King of Spain, finally annexed thereto.

That case was for lands in the disputed territory. For how much stronger reason should these exceptions be maintained in the territory ceded by that treaty. The express exceptions embraced two kinds of grants—(1) those made under certain conditions which had not been or would not be complied with within the time mentioned in the article; (2) those made since the 24th day of January, 1818.

The next case in which this act came before the court was *McMicken* v. *United States* (97 U. S., 204). The court again, thru Mr. Justice Bradley, said:

> We do not understand that the act of 1860 was intended to make any claims valid which would not have been so before, if the government making the grant had had the right to make it. The objection of want of title in the granting power was removed by the act as to all grants made by a government in possession, which were otherwise sustainable on the principles of justice and equity; the time for presenting claims was opened and extended, and actual surveys were dispensed with where the land could be otherwise

> identified. These were the principal remedial provisions of the act, so far as relates to the validity of titles. Claims invalid from intrinsic defects in 1815 or 1825 are not helped by the act of 1860. The utmost that our treaty stipulations ever required was that we should sustain titles which would have been sustained by the government from which our title to the territory was derived. Nothing more could be fairly asked, and we think that nothing more was intended by Congress to be given, except to make provision (as it did from time to time) in favor of actual settlers.

This case of McMicken was decided upon the point that no title was granted; nothing but a permit to inhabit and cultivate as preliminary to a grant; and no attempt was ever made to fulfil the conditions nor any plausible excuse given for their nonfulfillment. But it is of value in showing the view taken of the statute and its object. Said the court:

> But as it seems to be thought that every semblance of title or concession, however stale, and without regard to conditions of whatever kind, has been revived and validated by the act of 1860, we have preferred to review the original grounds upon which the policy of the United States Government with regard to these Spanish and other grants was based and to show what that policy really was.

On the same day was decided the case of *United States* v. *Watkins* (97 U. S., 219). The opinion was delivered by the same justice, who said:

> This case is very different from the preceding (McMicken), being based upon a complete and perfect title, bearing date the 5th of March, 1804. This title consists of a Spanish grant, made by the intendant Morales to one Charles Ramos, for 20,000 arpents of land, situated in the St. Helena portion of Baton Rouge district, on the Amite River, and described by certain metes and bounds, according to a survey thereof which had been previously regularly made. The grant was made in pursuance of a sale of the land; and altho made according to the views of our Government after the title of Spain had ceased to exist, yet it was made while that Government had actual possession of the country and claimed the sovereignty thereof; and, therefore, it is within the purview of the act of 1860 (12 Stat. L., 85), and comes clearly within the case of *United States* v. *Lynde* (11 Wall., 632).

Scull v. *United States* (*supra*) was an appeal from the decree of the district court for the western district of Missouri. The suit was brought under the act of 1860, for a large tract of land, claimed by virtue of a grant by Baron de Carondelet, Spanish governor of Louisiana, December 22, 1793. The claim was rejected "for want of any actual

survey at the time the grant was made, or at any other time, by the Spanish Government, for want of any other separation of the land granted from the mass of the public domain, and for want of any description of the land granted in the instrument of cession, or order of survey, by which the land can be surveyed and identified." The court, by Mr. Justice Miller, cited and emphasized its previous decisions.

United States v. *Clamorgan* (101 U. S., 822) and *D'Auterive* v. *United States* (101 U. S., 700) were suits brought under this act, in which the previous decisions were sustained, and the claims in both cases were rejected because of uncertainty of location and vagueness of description and want of legal survey.

United States v. *De Morant* (123 U. S., 335) was a petition filed under the eleventh section of the act of 1860 for two parcels of land, northwest of Pensacola, granted by Don Jose Masot, governor of West Florida, one on the 8th day of October, 1817, and the other on the 20th day of January, 1818. In 1824 these Spanish titles were presented to the commissioners appointed under the act of May 8, 1822, for ascertaining claims and titles to land within the district of West Florida. They were rejected for the reasons reported, that no evidence was given of cultivation, as required, and that the claims had not emanated from His Catholic Majesty or his lawful authorities in West

Florida prior to January 24, 1818, or that the order of survey had not been actually anterior to that period. (American State Papers, Public Lands, Vol. IV, p. 199.) The dates of the surveys show they were both made after the 24th day of January, 1818, but, as the court said, "the grants were made before that period." And, in speaking of the provisions of the eighth article of the treaty, the court said:

> The commissioners construed these provisions of the treaty as *invalidating grants made prior to the date named*, if the surveys were not completed until after that date. This construction was opposed by the claimants who were affected by it, and a different view, perhaps, might well have been taken. But, be that as it may, the act of 1860, under which the present proceedings were instituted, made the date of cession to the United States, or the time of transferring possession, the point from which to test the validity of grants. * * *
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> The act of 1860 was intended to give relief to a large class of grantees of former governments whose claims had been rejected by the different boards of commissioners, and by the courts, under the strict construction of the treaties, which prior laws had required. The history of the question is given at some length in the opinion of this court in the case of *United States* v. *Lynde*, and need not be repeated here.

Indeed, as far back as *United States* v. *The Heirs of Clarke and Atkinson*, 16 Pet., 228, this court said:

> By the eighth article of the Florida treaty no grants made after the 24th of January, 1818, were valid; nor could a survey be valid on lands other than those authorized by the grant; still, the power to survey in conformity to the concession existed up to the change of flags.

We have already seen that statutes were from time to time enacted for the adjustment of land claims within the States of Missouri and Arkansas, and in Louisiana and so much of the States of Mississippi and Alabama as is included in the district of country south of the thirty-first degree of north latitude and between the Mississippi and Perdido rivers. We have seen that these statutes were ineffective in many cases, because they related to inchoate and incomplete titles, and were intended to give a means of completing them; and also that this court held that Spain could not make any valid grant to lands in the disputed territory after the treaty of St. Ildefonso. We have seen that the primary intention of the act of 1860 was to validate grants made by the Spanish Government to *bona fide* grantees of lands in the disputed territory, whilst the Government remained in possession of the territory and claimed sovereignty over it.

We have also seen that after the treaty of Wash-

ington of February 22, 1819, acts of Congress were past providing for the settlement and confirmation of private land claims in Florida. These acts were distinct and different from those which related to titles in the disputed territory. There was never any dispute that the country east of the Perdido was ceded by the treaty of 1819. There was never any question as to the fact or the right of possession. When Congress came to legislate on the subject of titles within that territory it always referred to the titles annulled by the treaty. These were not to be considered. And in all the efforts for legislation to settle the private land claims in east and west Florida no reference or allusion was ever made to the existence of grants thus declared to be null and void.

IV.

The petitioners are not within the provisions of the act of 1860.

By the eleventh section of the act the claimants may present their petition to the District Court, "unless such claim comes with the purview of the third section of this act."

The third section of the act provides:

> The claims so presented and past upon by the commissioners, as aforesaid, shall be by them divided in their report into three distinct classes, as follows, viz:

Number one shall contain all claims which, in their opinion, ought to be confirmed, where the

lands claimed have been in possession and cultivation by the private claimants or those under whom they derive title for a period of at least twenty years preceding the date of filing the claim, by virtue of some grant, concession, or order of survey, permission to settle, or other written evidence of title emanating from some foreign government which held or claimed sovereignty or jurisdiction over the territory in which the lands claimed are situated, and where the title emanating from such foreign government bears date anterior to the cession of said territory to the United States.

Number two shall contain all claims which, in their opinion, ought to be confirmed, where the lands are claimed under written evidence of title, as above provided in class *number one*, but where there has been no actual possession and cultivation of the land claimed for a period of at least twenty years prior to the filing of the claim.

Number three shall contain all claims which, in their opinion, ought to be rejected, whether from defect of proof, suspicion of fraud based on probable ground, uncertainty of location, vagueness of description, or any other cause sufficient, in their opinion, to justify such rejection:

Provided, That in no case shall such commissioners embrace in said classes *number one* and *number two* any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority

of Congress and rejected as being fraudulent or procured or maintained by fraudulent or improper means; nor shall any such claim be received or considered by the commissioners which has been already twice rejected on the merits by previous boards.

This proviso embraces the claims which are excluded from the jurisdiction of the court as coming within the purview of the third section. The claim of John Forbes & Co., set forth in the petition in this case, was examined by the judge of the Superior Court for the Western District of Florida and rejected as fraudulent. This grant is alleged to have been made by the Captain-General of Cuba and the Floridas on the 10th day of January, 1818. It was so reported to the Secretary of the Treasury, to be laid before Congress for their determination. The report was based upon an exemplification of the grant presented to and received by the commissioners. But, on the hearing before the judge of the Superior Court, the original or *registro* of the grant, obtained by General Call, the special commissary and agent of the Government, appointed for that purpose by President Jackson, was produced and received by the court. It was urged then that the case must be decided by the Spanish law in force when the grant was made; and that by that law the "registro" or original title paper could not be used in a court of law as evidence, and that the exemplified copy, furnished by the authorized official, of this registro, was the

only competent evidence of a grant authorized to be used in courts as evidence of the official action of the King of Spain or his lawful authorities.

These proceedings for the settlement and confirmation of land titles in Florida are under acts of Congress which prescribe the manner in which the questions are to be determined. Under the act of 1822 the commissioners were directed to examine and determine on the validity of patents, grants, concessions, and orders of survey agreeably to the laws and ordinances heretofore existing of the Government making the grants; but it was also directed they should have due regard in all Spanish claims to the conditions and stipulations contained in the eighth article of the treaty of February 22, 1819. By the act of 1828, under which the Territorial judge made his adjudications, it was declared that no claims should be received which had been reported by the commissioners as antedated or forged.

How could the commissioners report as to forgery or antedating if the exemplification was conclusive? It was by reference to the original document and memorandum, deposited in the official archives, that these facts could be established or refuted, because it must be the muniment of title forged or antedated to invalidate the grant. And by the act of 1824, which was incorporated in this act of 1828, the question of the validity of a title was to be settled and determined according to the law of nations, the stipulations of a treaty, the

laws and ordinances of the government from which it was derived, and the several acts of Congress in relation thereto, and all other questions properly arising between the claimants and the United States. These investigations, offered time and again thru long years to persons asserting rights derived from foreign powers, were to be conducted in perfect good faith to secure equity and justice to both the Government and the individual. It would be strange, indeed, if under such legislation, by the effect of a technical or arbitrary rule of evidence, titles were confirmed which could be shown to be absolutely null and void.

However, this claim was decided, in the manner stated, to be fraudulent. The judge reviewed the testimony and, with the grant before him, concluded it had been fraudulently altered and antedated to bring it within the term of the eighth article of the treaty.

It may be said that this decision was not by a public officer acting under authority of Congress. The proviso was framed evidently to cover every examination made by any authorized body. The various statutes appoint "commissioners," "registers and receivers," who are frequently called "boards of commissioners," and courts, or judges of courts. These latter are clothed with judicial powers and are the only officers who do not act in the capacity of commissioners. That they are public officers can not be disputed. The letter of the statute, then, embraces them.

It must be remembered that section 1 is much broader in its designation of the character of claims than section 11. The latter embraces only complete titles. The former embraces as well imperfect as perfect titles and without reference to the time of cultivation and possession. An option is given in the limited class of cases to apply to the district court. But that court must decide the claim valid or invalid "according to the principles of this act."

The principles of this act forbid the confirmation by the commissioners or the consideration by the court of any claim which had been rejected as fraudulent by anybody acting under authority of Congress, be it a commissioner, a board, a judge, or a court. Any other construction would render either tautological or unreasonable the words "other public officer." Indeed, where the same result was arrived at, it would be to say that it was intended the conclusion reached by a board, which had no higher power than to report to Congress, was of greater significance and credit than the adjudication of a court.

The matter was then submitted to the judge of the district court under the act of 1828, a hearing and trial had upon the merits, and the claim absolutely rejected because it was fraudulent.

The authority which was granted to the Commissioners to reject any claim from suspicion of fraud based on probable cause, or any other cause

sufficient, in their opinion, to justify such rejection, was a principle established in the act which was extended to the district court. During the time of the negotiations, in which was considered the matter of the confirmation and annullment of grants, it was understood and conceded on all hands that any grant or evidence of title then issued by the King of Spain or his authorities would be in bad faith and a fraud upon the contracting parties. (Am. St. Pap. IV, For. Rel., pp. 532, 618, 620, 627, 652, 653, 656, 662.) The chief reason for the long delay in ratification of the treaty by the King of Spain was a diplomatic quarrel as to the grants confirmed and annulled by the eighth article, principally directed to the three great grants. But it was not confined to them. Mr. Forsyth, our minister, in a note to the Duke of San Fernando and Quiroga, dated October 10, 1819, said:

> I am directed by the President to make known to His Catholic Majesty that the ratification by Spain will be received as valid on the precise and express condition that the grants of lands in the Floridas, made to the Duke of Alagon, the Count of Punon Rostro, and Mr. Vargas, and, in like manner, *any others which shall have been made under similar circumstances*, shall, in conformity with the eighth article of the said convention or treaty, be null and void, and shall never be admitted by the United States. (IV For. Rel., 666, 667.)

It is curious to notice that, while the moving consideration for the Forbes grant was the payment of an indemnity, the Captain-General deemed it necessary to state, as another motive, that the grantee, "by taking possession of (the land), will be able to benefit the province and bring colonists to establish themselves in it, rendering fruitful for the benefit of the State what now is desert and sterile." Whether for purposes of alienation or colonization the grant was equally objectionable.

It was not a sale for cultivation as were the grants in the disputed territory. It was liable to all the objections made to the three grants. The presumption is entirely fair that it was not known to the negotiators, and that it was not seriously regarded, until long afterwards it was forged and antedated to bring it within the lists of confirmed grants. And so it was not alluded to during the negotiations. But for condemnation and rejection it stands upon the same grounds as the others.

The decree in the District court was for a confirmation to the petitioners of a grant of February 20, 1818. The District judge, before whom the case was tried, delivered no opinion. The statute provides that upon appeal, the same shall be adjudged *de novo* in the Supreme Court as in other cases of appeal thereto in chancery, and as equity and justice and the principles aforesaid may require. The United States, therefore, submits the

reasons stated herein, why the grant, whether it be claimed as a grant of the 10th of January or the 20th of February, 1818, should be rejected.

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